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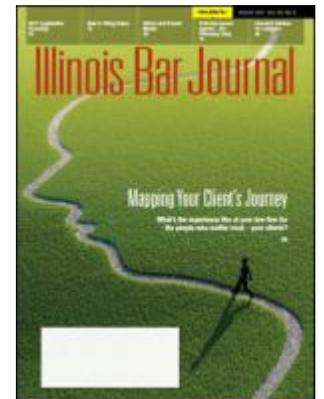
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Immigration / Family Law

Arguing Affidavits of Support

By [Stephanie L. Tang](#)

U.S. citizens must complete an affidavit of support if they file for their immigrant spouse to become a permanent resident. But if the partners divorce, the support obligation created by the affidavit is strict and potentially indefinite. Here's how to argue for and against enforcement.



A man comes into your office for an initial consult. He tells you he has only been married a few months and that to bring his wife to America, he agreed to sponsor and support her by signing a Form I-864 Affidavit of Support ("I-864 Affidavit" or "Affidavit").¹ Now his wife has informed him she wants a divorce and is seeking to enforce his potentially indefinite support obligation pursuant to his executed affidavit.

The man says she is capable of full-time employment but has told him she will not look for a job, opting instead to receive support from him. He wonders if you can help him get out of his obligation.

Unfortunately, the answer is usually no. A court will likely find that the I-864 Affidavit is enforceable against him. Unlike in typical divorce cases, the judge will not have discretion to consider the wife's earning potential or the short duration of the marriage. Instead, the court, and the man in your office, will be bound by the terms of the I-864 Affidavit.

The foregoing hypothetical demonstrates the strict enforcement and potentially harsh consequences of the I-864 Affidavit. Unfortunately, there is little precedent to guide courts in providing relief to sponsor spouses who may not have understood the gravity of their obligation. This article first outlines the background and terms of an I-864 Affidavit and highlights the key requirements for Affidavit sponsors. It then analyzes the limited seventh circuit case law on I-864 Affidavits and summarizes approaches taken by other jurisdictions in determining whether a sponsor's support obligation should be reduced or waived. Finally, it explores defenses Illinois practitioners could consider when arguing against enforcement of the I-864 Affidavit.

TAKEAWAYS:

- Under federal immigration law, any U.S. citizen or permanent resident who files an immigration petition for their spouse must complete an I-864 Affidavit of Support. The Affidavit imposes an obligation on the sponsor to provide support to the foreign national beneficiary at 125% of the Federal Poverty Guidelines and to reimburse government agencies for any means-tested public benefits paid to the beneficiary.
- Given the strict and potentially indefinite support obligation imposed on a sponsor under an I-864 Affidavit of Support, it is no surprise that immigrant spouses frequently seek enforcement of the Affidavit.
- While courts are split on some of these issues and case law is scarce, a litigant defending against an Affidavit of Support should consider the following arguments: (1) there was no consideration for the Affidavit; (2) the Affidavit is an unconscionable contract; (3) a valid prenuptial agreement waives the Affidavit; (4) enforcement is barred res judicata; and (5) the Affidavit cannot be enforced in a state court.

Background

What is an I-864 Affidavit of Support? In 1996, Congress passed amendments to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 making clear that any U.S. Citizen or Permanent Resident who files an immigration petition for their spouse must complete an I-864 Affidavit, with rare exceptions.² The stated statutory goal of an I-864 Affidavit is to prevent the admission of any immigrant who may likely become a public charge.³ The Department of Homeland Security defines a "public charge" as "an individual who is likely to become primarily dependent on the government for subsistence."⁴



The I-864 Affidavit imposes an obligation on the sponsor to provide support to the foreign national beneficiary at 125 percent of the Federal Poverty Guidelines and to reimburse government agencies for any means-tested public benefits paid to the beneficiary.⁵ Consequently, a government agency may sue the sponsor for an amount they believe the sponsor owes within "ten years after the date on which the sponsored alien last receive[s] any means-tested public benefit to which the Affidavit of Support applies."⁶

The I-864 Affidavit further warns applicants that "if [the sponsor] does not provide sufficient support to the person who becomes a permanent resident based on the I-864 that [the sponsor] signed, that person may sue [the sponsor] for this support."⁷ This means both a government agency and an immigrant spouse may have a valid claim against a sponsor.

The I-864 Affidavit then outlines a limited list of "termination events" that would end the sponsor's obligation: (1) the death of a sponsor or sponsored immigrant; (2) the sponsored immigrant becomes a naturalized citizen; (3) the sponsored immigrant permanently leaves the United States; or (4) the sponsored immigrant completes 40 qualifying quarters of work (approximately 10 years).⁸

Divorce is not a termination event.⁹ The I-864 Affidavit also does not require the sponsored immigrant to notify the sponsor when a termination event occurs.¹⁰

Requirements for sponsors. An individual must meet several requirements to become a sponsor. First, sponsors must be at least 18 years old and live in the United States.¹¹ Second, a sponsor must be a U.S. citizen or national or a lawful permanent resident.¹²

Finally and most importantly, they must prove they have a sufficient annual income or assets to "maintain the intending immigrant(s) and the rest of [the] household at 125 percent of the Federal Poverty Guidelines."¹³ To meet this requirement, sponsors must provide documentation of their assets and income, along with the past three years' tax returns.¹⁴

Litigating enforcement of an I-864 Affidavit

Considering the strict and potentially indefinite support obligation imposed on a sponsor, it's no surprise that immigrant spouses frequently seek enforcement of the I-864 Affidavit. Even so, there is relatively little case law on the subject. Accordingly, Illinois practitioners arguing for or against enforcement must to look to rulings in the federal seventh circuit and outside jurisdictions.

Seventh circuit analysis. The 2012 seventh circuit case of *Wenfang Liu v. Mund* emphasizes the potentially harsh consequences of entering into an I-864 Affidavit. In *Mund*, Mund (an American citizen) agreed to sponsor Liu (a Chinese citizen).¹⁵ The couple divorced two years later and the Wisconsin divorce court ordered Mund to pay \$500 a month to Liu for one year for spousal support separate from Mund's obligation under the I-864 Affidavit. The court expressly conditioned Mund's spousal support on Liu making an active effort to seek employment.

The divorce court declined to address Mund's support obligation under the I-864 Affidavit. Consequently, Liu subsequently filed a claim in the U.S. District Court for the Western District of Wisconsin to enforce it. The district court held that Liu was not entitled

to receive support because she had not actively sought employment.

On appeal, the seventh circuit reversed the district court's finding. In arriving at its decision, the court looked at federal common law, as well as the underlying statute, legislative history, and statutory purpose of the Affidavit. Specifically, the court found that federal courts had not created a common law duty of a mandatory job search to mitigate a sponsor's obligation.

The court then noted that both the statute and legislative history were silent regarding mitigation and that mitigation was not listed among the limited "terminating conditions" on the Affidavit. The court observed that the government never added a duty to mitigate despite revising the terminating conditions of the Affidavit on several occasions.

The court went on to opine that not imposing a duty to mitigate on an immigrant spouse was consistent with the statutory purpose of the Affidavit. Specifically, the court reiterated the statutory goal of the Affidavit is "to prevent the admission to the United States of any alien who 'is likely at any time to become a public charge.'"¹⁶ This purpose was, the court explained, "for the benefit of federal and state taxpayers" rather than the sponsors.¹⁷ Accordingly, the court opined that the absence of a duty to mitigate "make[s] prospective sponsors more cautious about sponsoring immigrants" and advances the statutory purpose of preventing immigrants from becoming public charges.¹⁸

Analysis of the Affidavit in other jurisdictions. Because there is scant case law about I-864 Affidavits, practitioners should look to other jurisdictions to build their case for or against enforcement.

Reducing a sponsor's support obligation. Courts have traditionally found that a sponsor's support obligation under an I-864 Affidavit should be reduced by the amount of income the immigrant spouse receives. In *Naik v. Naik*, the court asserted that it was proper to consider an immigrant spouse's income, assets, and other sources of support in determining a sponsor's obligation.¹⁹

Similarly, in *Younis v. Farooqi*, the court held that a sponsor is "required to pay only the difference between the sponsored non-citizen's income and the 125% of poverty threshold."²⁰ These cases suggest that even if a litigant cannot argue for a complete elimination of the support obligation there may be an argument for a reduction.

Deviating from spousal maintenance guidelines. Courts are divided on whether the support obligation imposed by an I-864 Affidavit should warrant a deviation in the amount of spousal maintenance awarded to an immigrant spouse. The seventh circuit indicated that "[t]he right of support conferred by federal law exists apart from whatever rights [a sponsored immigrant] might or might not have under [state] divorce law."²¹ This suggests that a state divorce court may order standard spousal maintenance without considering a sponsor's obligation under an I-864 Affidavit.

However, other courts have found that existence of a support obligation under an I-864 Affidavit should warrant a downward deviation from the standard support schedule.²² Notably, in the Illinois case *In re the Marriage of Amin*, the court found it was not an abuse of discretion to award rehabilitative maintenance rather than permanent maintenance despite existence of an executed I-864 Affidavit imposing a potentially indefinite support obligation.²³

Potential defenses

Given the limited case law, Illinois practitioners should cast a wide net of potential defenses when seeking to prevent enforcement of the I-864 Affidavit. Here are several potential arguments practitioners have made in other jurisdictions that might succeed in Illinois.

There was no consideration for the Affidavit. Litigants often argue that the I-864 Affidavit should not be enforced because there was no consideration for the agreement and thus the contract isn't valid. Sponsors may argue there is no consideration because they believe they are not receiving anything for entering into the agreement.

However, prior case law and the language of the Affidavit severely undermine this argument. In *Stump v. Stump*, the court found that the government's agreement to not find the applicant inadmissible was adequate consideration.²⁴ Similarly, in *Baines v. Baines*, the court opined that a spouse "obtaining legal permanent residence in the United States and...her not being deported" constituted valid consideration.²⁵

Moreover, the I-864 Affidavit specifically cautions the sponsor that the form creates "a contract between [the sponsor] and the U.S. Government. The intending immigrant's becoming a permanent resident is the 'consideration' for the contract."²⁶

The Affidavit is unconscionable. Practitioners may try to argue that the I-864 Affidavit cannot be enforced because it is unconscionable. Illinois courts have defined an "unconscionable bargain" as one "which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other."²⁷ Divorce practitioners might argue the Affidavit is unconscionable because the amount of support an applicant would receive under it is more than the amount of maintenance they may otherwise receive under the Illinois Marriage and Dissolution of Marriage Act.²⁸

However, those who have tried this argument in other states have been unsuccessful. The court in *Baines v. Baines* specifically found it was reasonable that a sponsor would want to both provide financial support for his spouse's immigration process and support her lifestyle in America.²⁹

A valid pre-nuptial agreement waives the obligation. Courts are split on whether spouses may waive the right to sue their sponsors under the I-864 Affidavit by entering into a valid pre-nuptial agreement. Courts finding no waiver note that an outside agreement is not listed as a termination event.³⁰ Additionally, these courts hold that Affidavit rights cannot be waived because federal law imposes them.³¹ Note that even if a court finds the immigrant waived their right to sue their sponsor under the Affidavit pursuant to a pre-nuptial agreement, the government likely still has a claim against the sponsor if the immigrant starts receiving benefits.

The claim is barred res judicata. Courts are similarly split on whether a claim for support pursuant to an I-864 Affidavit can be barred res judicata. In *Chang v. Crabill*, the court determined an immigrant's claim for support was not barred where the immigrant was unaware she had a cause of action against her sponsor husband until her friend informed her she had successfully litigated such a claim.³²

Conversely, the court in *Mergia v. Adams* found an immigrant was barred from pursuing her support claim in her sponsor's bankruptcy case because the immigrant "could have pursued her support claims under the affidavit of support in the [prior] divorce proceedings."³³

The affidavit cannot be enforced in a specific court. Another potential defense is that the Affidavit cannot be enforced in the particular court in which enforcement is being sought. In early 2016, upon reviewing relevant case law from other jurisdictions, a Circuit Court of Cook County judge found that although the contract was otherwise valid, there was no legal basis for enforcement in a state divorce court action.³⁴

Nevertheless, the court awarded the immigrant spouse spousal maintenance separate from her enforcement claim. This approach mirrors the one taken by the Wisconsin divorce court that issued the initial divorce decree in *Liu v. Mund*, where the Wisconsin divorce court similarly declined to make a determination regarding the sponsor's support.

Conclusion

According to a Census Bureau study, one in five marriages in America involve a foreign-born spouse.³⁵ With Illinois being one of the 15 states with the highest share of immigrants in its population,³⁶ the chances that a native-born person will marry a foreign-born spouse are even higher. As more foreign-born spouses apply for permanent resident status, the number of executed I-864 Affidavits is sure to rise exponentially as well.

Accordingly, it is critical for Illinois practitioners to have a basic understanding of the I-864 Affidavit and its potential consequences in both federal and state court. By looking at cases from other jurisdictions, practitioners can build stronger and more comprehensive arguments for and against enforcement of this complicated form.



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ISBA RESOURCES >>

ISBA Free CLE, [Immigration Law Update Spring 2017: Changes That Affect Your Practice and Clients](#) (recorded Jan. 12, 2017)

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20. *Younis v. Farooqi*, [597 F. Supp. 2d 552](#), 556 (D.Md. 2009).

21. *Liu*, 686 F.3d at 419.
 22. *Love v. Love*, [33 A.3d 1268](#), 1277 (Pa. Super. Ct. 2011).
 23. *In re the Marriage of Amin*, 2011 IL App (2d) 100431-U.
 24. *Stump v. Stump*, No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 26022, at *6-7 (N.D. Ind. Oct. 25, 2005).
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